Nos. 94-231 and 94-243

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In the Supreme Court of the United States

OCTOBER TERM, 1994

TOMMY ROSS ANDERSON AND SARAH JANE ANDERSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

JERRY WAYNE TILLEY AND SUSAN WELLS TILLEY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in treating the properties forfeited as proceeds of illegal drug sales, based on facts alleged in the forfeiture complaint, the stipulated judgment of forfeiture, and petitioners' representations on appeal.

2. Whether the Double Jeopardy Clause of the Fifth Amendment prohibits the criminal prosecution of petitioners for drug crimes, following a civil judgment of forfeiture against the proceeds of some of petitioners' narcotics activities.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 18 F.3d 295.[1] The opinion of the district court denying the motion to dismiss the indictment on double jeopardy grounds (Pet. App. 14a-20a) is unreported.

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[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 94-243.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1994. A petition for rehearing was denied on May 11, 1994. Pet. App. 13a. The petition for a writ of certiorari in No. 94-231 was filed on August 8, 1994, and the petition in No. 94-243 was filed on August 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are under indictment for narcotics-related offenses in the United States District Court for the Northern District of Texas. Petitioners moved to dismiss those charges on the ground that their prosecution is barred by the Double Jeopardy Clause of the Fifth Amendment, because the government previously forfeited cash, securities, and other personal property claimed by petitioners. The district court denied petitioners' motion to dismiss the criminal charges. Pet. App. 14a-20a. The court of appeals affirmed. *Id.* at 1a-12a.

1. Petitioners operated a large-scale marijuana distribution organization in the Dallas, Texas, area. From 1986 until 1991, that operation allegedly sold and delivered several thousand kilograms of marijuana throughout the United States. Petitioners accumulated large amounts of wealth, as evidenced by their ownership of numerous expensive automobiles, luxury homes, jewelry, and certificates of deposit. In spite of the outward signs of wealth they displayed, petitioners reported only small amounts of taxable income to the Internal Revenue Service during the relevant years. Pet. App. 2a-3a, 14a-15a.

On July 25, 1991, the government commenced a civil action for forfeiture, pursuant to 21 U.S.C. 881(a)(6) and (7), against various items of real and personal property

held by petitioners.[2] The forfeiture complaint alleged that the items of personal property were the proceeds from the sale of illegal drugs, or were traceable to such proceeds, and that the real property was used to facilitate the storage and distribution of illegal drugs. See 94-243 Pet. 2; Pet. App. 2a-3a & nn.1-2, 15a, 21a-35a.

On October 8, 1992, while the forfeiture proceeding was pending, an indictment was returned charging petitioners and others with conspiracy to possess marijuana

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[2] 21 U.S.C. 881(a)(6) and (7) provide as follows:

(a) Subject property

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * * * *

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

with intent to distribute it, and to use a communication facility in the commission of a drug-related felony, in violation of 21 U.S.C. 846, and with 13 counts of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. App. 2a-3a.[3]

On February 5, 1993, petitioners entered into a stipulated forfeiture agreement with the United States, by which they agreed to forfeit cash, certificates of deposit, automobiles, and other personal property with a value totalling approximately $650,000. Pet. App. 48a-61a; 94-231 Pet. App. D1-D7. Based on the stipulated forfeiture agreement, the district court entered a judgment of forfeiture; the judgment did not include forfeiture of two homes belonging to petitioners. Pet. App. 3a, 15a-16a, 62a-72a.

2. Following the stipulated forfeiture, in April 1993, petitioners filed a motion to dismiss the indictment, claiming that a criminal prosecution after the forfeiture judgment would subject them to double jeopardy. Pet. App. 3a, 16a, 73a-86a. Petitioners relied on *United States* v. *Halper*, 490 U.S. 435 (1989), in which this Court held that a civil fine could be considered "punishment" so as to make the Double Jeopardy Clause applicable, if the civil sanction were so "overwhelmingly disproportionate" to the damage caused that it could "not fairly be characterized as remedial, but only as a deterrent or retribution." *Id.* at 449.

The district court rejected petitioners' claim. Pet. App. 14a-20a. The court reasoned that if petitioners were correct, the rule of *Halper*, specifically limited by this Court to "the rare case" (490 U.S. at 449) where a

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[3] Petitioners Jerry Wayne Tilley and Tommy Ross Anderson were also charged with one count of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i).

small-gauge offender suffers a sanction grossly disproportionate to the damage he caused, would apply to virtually every case in which the government seeks forfeiture of the property of drug traffickers. Pet. App. 18a-19a.

3. The court of appeals affirmed. Pet. App. 1a-12a. The court considered all of the personal property forfeited to represent the "proceeds" of illegal drug trafficking, based on the allegations in the forfeiture complaint as well as petitioners' argument on appeal. *Id.* at 3a n.2, 5a. The court then determined that, unlike the fine imposed in *Halper*, the forfeiture of the proceeds of illegal drug sales in this case is fairly characterized as remedial. Noting the substantial governmental and societal costs that result from trafficking in illegal drugs, the court found that the amount of illicit drug proceeds forfeited in this case was not excessive in relation to the $60 billion to $120 billion per year in estimated costs. Furthermore, because petitioners forfeited only a portion of the total proceeds they had amassed over several years, the court concluded that the amount forfeited actually failed to compensate the government fully for the entire amount of the harm the drug sales had caused. *Id.* at 7a-9a.

The court also rejected petitioners' claim that *Austin* v. *United States*, 113 S. Ct. 2801 (1993), requires that all forfeitures be considered "punishment" for double jeopardy purposes. The court noted that *Austin* held that the Excessive Fines Clause of the Eighth Amendment applies to civil forfeitures obtained pursuant to 21 U.S.C. 881(a)(4) and (7). The court, however, distinguished those forfeitures—which generally involve conveyances used to transport drugs and real estate used in drug transactions—from forfeitures involving the proceeds of criminal activity. The court explained that

the forfeiture of drug proceeds, unlike the forfeiture of facilitating property, will always be "roughly proportional to the harm inflicted upon government and society by the drug sale," because the amount of forfeitable proceeds turns on the amount of drugs sold. Pet. App. 9a-10a.

Finally, the court held that the test of *Halper* should not apply in any event to the forfeiture of illegal drug proceeds, because the government does not punish when it confiscates property that was not lawfully acquired. In such cases, "the forfeiting party loses nothing to which the law ever entitled him." Pet. App. 10a. The court explained:

> The possessor of proceeds from illegal drug sales never invested honest labor or other lawfully derived property to obtain the subsequently forfeited proceeds. Consequently, he has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity. * * * [T]he forfeiture of illegal proceeds, much like the confiscation of stolen money from a bank robber, merely places that party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme. This is not punishment "within the plain meaning of the word."

Id. at 11a-12a (quoting *Halper*, 490 U.S. at 449).

ARGUMENT

1. Petitioners contend (94-231 Pet. 17-19; 94-243 Pet. 23-27) that the court of appeals erred in concluding that the property forfeited in this case was proceeds of illegal drug sales. Petitioners contend that the district court found that the forfeited properties were "instrumen-

talities" of drug trafficking, and that the court of appeals should have ordered an evidentiary hearing on that question. There is no merit to those claims.

Contrary to petitioners' claims, the district court made no finding that the forfeited properties were instrumentalities, as opposed to proceeds, of the drug crimes. The district court broadly held that the reasoning of *United States* v. *Halper*, 490 U.S. 435 (1990), had no application to forfeiture, relying on a Ninth Circuit case decided before this Court's decision in *Austin* v. *United States*, 113 S. Ct. 2801 (1993). Pet. App. 16a-19a. The specific character of the properties or the basis for the forfeiture of each property did not figure at all in the district court's reasoning.

The court of appeals noted that the district court's order did not specify whether the personal property constituted actual proceeds of drug sales or property used in the commission of the crimes. As the court of appeals recognized (Pet. App. 3a n.2), however, the forfeiture complaint, with the accompanying affidavit that was incorporated by reference, alleged that the personal property and some of the real property sought to be forfeited were proceeds of the illegal drug sales. See Complaint for Forfeiture, Anderson R.E. Tab 6, at 9-10; Verification Affidavit, Anderson R.E. Tab 10, at 32-41; Verification Affidavit, Tilley R.E. Tab 8, at 51-56. In the stipulated forfeiture, petitioners agreed that the United States had probable cause to seize and forfeit the properties named in the complaints, with certain properties excepted, and they thereby accepted the allegations of the complaints. See Pet. App. 48a-49a; 94-231 Pet. App. D1.

Furthermore, petitioners expressly urged the court of appeals to decide the case on the theory that the forfeited properties were "proceeds" of drug activity, not

instrumentalities. See Anderson C.A. Br. 21; Tilley C.A. Br. 2, 12-15. Indeed, petitioners' strategy was to attack the district court for failing to recognize that the properties were "proceeds" of their drug activities. As the Tilley petitioners put it, the district court's purported assumption that the properties were "instrumentalities" was not "relevant to this case, because the record is absolutely devoid of evidence indicating that these properties were forfeited as 'instrumentalities,' and is replete with evidence to the contrary, i.e., that these properties were forfeited as 'proceeds' of drug transactions, which are not 'instrumentalities' of a crime, but are instead a person's reward for committing the crime." Tilley C.A. Br. 12. The Anderson petitioners made claims to the same effect. See Anderson C.A. Br. 21.[4] In light of those

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[4] The Anderson petitioners argued (C.A. Br. 21) that

> [t]he fatal flaws [*sic*] in the District Court's order is its assumption that the property forfeited here was "instrumentalities" of the alleged crime. The record is devoid of any evidence supporting, much less compelling, this conclusion. Moreover, if given the opportunity through a proper hearing Appellants will demonstrate that the seized property in fact was not the instrumentalities [*sic*] of any crime. It should be noted that the forfeiture documents * * * do not establish that the forfeited property was instrumentalities of the crime and as the District Court noted * * *, the forfeiture proceedings were based on alternative theories of the property being instrumentalities of the offenses as well as proceeds from the offenses.
>
> [The case relied on by the district court] does not stand for the proposition that the forfeiture of *proceeds* of a drug offense can never constitute double jeopardy in face [*sic*] of a criminal prosecution for the same conduct.

arguments, the court of appeals correctly concluded that petitioners "waived any argument that the forfeited property was anything but proceeds." Pet. App. 3a n.2. That fact-bound ruling warrants no further review.

2. Petitioners also contend (94-231 Pet. 4-17; 94-243 Pet. 4-22) that the forfeiture of property as proceeds of an illegal drug business under 21 U.S.C. 881(a)(6) is punitive in nature and that its imposition bars a subsequent criminal prosecution for the same conduct. The court of appeals correctly rejected that claim, and further review is not warranted.

In *United States* v. *Halper*, 490 U.S. 435 (1989), the Court held that the defendant, who had previously been convicted of crimes growing out of his Medicare fraud, could not be subjected to a punitive civil penalty for those crimes without violating the Double Jeopardy Clause of the Fifth Amendment. The Court stated that it was announcing a rule for "the rare case" in which "a prolific but small-gauge offender [is subjected] to a sanction overwhelmingly disproportionate to the damages he has caused," so that the sanction "may not fairly be characterized as remedial, but only as a deterrent or retribution." 490 U.S. at 449. The Court made clear, however, that "the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis." *Id.* at 446; *id.* at 452-453 (Kennedy, J., concurring).

See also *id.* at 10 ("The forfeiture action in this case was begun and pursued with a punitive purpose, i.e., to take from Appellants property allegedly acquired by illegal drug dealing").

Halper does not support petitioners' claim that a civil forfeiture of the proceeds of drug activity—*i.e.*, the seizure of the ill-gotten profits from narcotics trafficking—must always be characterized as punitive. To the contrary, as the court of appeals noted, the forfeiture of drug proceeds under 21 U.S.C. 881(a)(6) is akin to the forfeiture of contraband or other illegal items; that action is thus clearly remedial. Nothing in *Halper* suggests that it is "punishment"—"in the plain meaning of the word," 490 U.S. at 449, or in any other sense—for the government to seize the illegally acquired profits of criminal activity. Indeed, as the court of appeals suggested (Pet. App. 11a), petitioners' legal theory, if adopted, would permit a bank robber to bar his criminal prosecution on the ground that the government has already seized the money he stole during the robbery.

Furthermore, as the court of appeals also explained, a forfeiture of drug proceeds, unlike the fine imposed in *Halper*, is not disproportionate to the amount of the damage caused by the illegal activity. The damage caused by each instance of narcotics trafficking is at least equal to, and quite probably much greater than, the illicit gain garnered by the trafficker.[5] That revenues derived from forfeitures are then used to fund the costs of detection, investigation, and prosecution of drug traffickers, and to reimburse society for the costs of combatting drug abuse and caring for its victims, only reinforces the remedial character of the forfeitures at issue. Cf. *Caplin & Drysdale, Chartered* v. *United*

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[5] In fact, in this case the value of what was forfeited represented only a portion of the total proceeds taken in by petitioners' illegal business over several years. The total forfeiture was therefore far less than the costs that could be attributed to their illegal activity. Pet. App. 9a.

States, 491 U.S. 617, 629 (1989) (noting that government has legitimate interest in forfeiting a criminal's ill-gotten gains to fund a variety of law enforcement activities).

This Court's recent decision in *Austin* v. *United States*, 113 S. Ct. 2801 (1993), does not change the conclusion that the forfeiture of drug proceeds in the instant case is remedial and nonpunitive. In finding that the forfeiture provisions at issue in *Austin* (21 U.S.C. 881(a)(4) and (7)) constitute punishment for purposes of the Eighth Amendment's Excessive Fines Clause, the Court distinguished its prior holdings concerning the forfeiture of contraband or goods involved in customs violations and noted that the forfeitures in both cases were remedial. 113 S. Ct. at 2811-2812, citing *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984) (forfeiture of unlicensed firearms discourages unregulated commerce in firearms and removes from circulation firearms used outside regulated channels of commerce), and *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972) (per curiam) (forfeiture of undeclared imported merchandise prevents forbidden merchandise from circulating in the United States, and provides a reasonable form of liquidated damages). The Court also cited the same cases in observing that "[t]he Double Jeopardy Clause has been held not to apply in civil forfeiture proceedings, but only in cases where the forfeiture could properly be characterized as remedial." *Austin*, 113 S. Ct. at 2805 n.4; see also *United States* v. *United States Currency in Amount of One Hundred Forty-Five Thousand, One Hundred Thirty-Nine Dollars*, 18 F.3d 73, 75-76 (2d Cir. 1994) (forfeiture of unreported monetary instruments under 31 U.S.C. 5317(c) after criminal conviction for same conduct held remedial, where currency was "the very goods covered

by the regulation," and was therefore "the very *sine qua non* of the crime"), cert. denied, No. 93-1932 (Oct. 3, 1994).

The *Austin* Court did rest its decision in part on the fact that the forfeiture provisions involved in that case (21 U.S.C. 881(a)(4) and (7)) were tied directly to the commission of a drug offense, and on language in the legislative history referring to the inadequacy of the traditional criminal sanctions of fine and imprisonment for deterring and punishing drug offenders. 113 S. Ct. at 2811. The statutory provision at issue in this case, however, while also tied to the commission of a crime, does not seek the kind of penalty that was at issue in *Austin*—the deprivation of property that was in no way unlawful to acquire or possess, and whose value "can vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental." *Id.* at 2812 n.14. As the court of appeals reasoned, unlike the heavy penalty imposed in *Halper*, the forfeiture of a portion of petitioners' illegal proceeds "does not punish the defendant because it exacts no price in liberty or lawfully derived property from him." Pet. App. 11a. Accord *SEC* v. *Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994) (disgorgement order following criminal conviction for violation of securities laws not a punishment but remedial only, as it requires defendant to give up only his ill-gotten gains and does not impose an additional penalty, citing the court of appeals' decision in this case).[6]

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[6] Nor is this forfeiture similar to the tax on possession of dangerous drugs, which the Court found was a punishment for double jeopardy purposes in *Department of Revenue* v. *Kurth Ranch*, 114 S. Ct. 1937 (1994). The Court found it significant that

Moreover, petitioners would have no valid double jeopardy claim even if they were correct in their contention that the forfeiture of drug proceeds amounts to "punishment" in all cases. As this Court's cases recognize, the component of the Double Jeopardy Clause invoked by petitioners here does not prohibit the imposition of punishment *simpliciter*, but only the imposition of "multiple punishments *for the same offense*." *United States* v. *Halper*, 490 U.S. at 440 (emphasis added); *Department of Revenue* v. *Kurth Ranch*, 114 S. Ct. 1937, 1945 (1994) ("A defendant convicted and punished for an offense may not have a nonremedial civil penalty imposed against him *for the same offense* in a separate proceeding") (emphasis added). Whether two offenses are the "same" for double jeopardy purposes does not turn on whether "the same illegal conduct" was involved in both (94-243 Pet. 28), but on a comparison of the elements that the government is required to prove to prevail under each; the offenses are different if each requires proof of a fact that the other does not. See *Blockburger* v. *United States*, 284 U.S. 299 (1932); see also *United States* v. *Dixon*, 113 S. Ct. 2849 (1993) (overruling *Grady* v. *Corbin*, 495 U.S. 508 (1990)). If the forfeiture provision is considered an "offense" for double jeopardy purposes, that "offense" is not the "same" as the offenses for which petitioners are under indictment.[7]

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the tax in that case was conditioned on commission of a crime, but the tax was also exacted after the drugs had been confiscated and destroyed, and amounted to more than eight times the market value of the drugs. The assessment there clearly went far beyond merely stripping the wrongdoer of the profits of his illicit trade.

[7] The forfeiture "offense" does not require proof that petitioners engaged in narcotics trafficking. See, *e.g.*, *United States* v. *Chandler*, No. 93-2064 (4th Cir. Sept. 27, 1994), slip op. 5 ("It is not

Finally, even if the forfeitures in this case constituted "punishment," the "Double Jeopardy Clause simply is not implicated" if the criminal action is part of the same "proceeding" as the forfeiture action, because in a single proceeding "the multiple-punishment issue would be limited to ensuring that the total punishment did not exceed that authorized by the legislature." *United States* v. *Halper*, 490 U.S. at 450; see also *Missouri* v. *Hunter*, 459 U.S. 359 (1983). As the Eleventh and Second Circuits have concluded, for purposes of the Double Jeopardy Clause, "the simultaneous pursuit by the government of criminal and civil sanctions," such as the parallel actions filed by the government in this case, "falls within the contours of a single, coordinated prosecution" for which Congress has explicitly authorized the imposition of dual criminal and civil sanctions. *United States* v. *One Single Family Residence Located at 18755 North Bay Road*, 13 F.3d 1493, 1499 (11th Cir. 1994); *United States* v. *Millan*, 2 F.3d 17, 20 (2d Cir. 1993), cert. denied, 114 S. Ct. 922 (1994); but cf. *United States* v. *Torres*, 28 F.3d 1463, 1464-1465 (7th Cir. 1994)

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an element of the government's case to prove the involvement of the property's owner in the commission of the offense giving rise to the forfeiture"). And the narcotics crimes committed by petitioners—conspiracy and possession of a controlled substance with intent to distribute it—do not require proof that petitioners obtained proceeds or anything else of value. See 21 U.S.C. 841(a)(1) and 846. The fact that proceeds were derived from "some form of unlawful activity" is an element of the offense of laundering monetary instruments, see 18 U.S.C. 1956(a)(1), but that offense requires proof of a financial transaction and of the defendant's knowledge of the origin of the proceeds, *ibid.*, and it can be committed even when the property in question represents proceeds of crimes other than narcotics trafficking, see 18 U.S.C. 1956(c)(7).

(suggesting in dicta that parallel administrative and criminal actions constitute separate proceedings).[8]

3. The decision below conflicts with a recent decision by the Ninth Circuit in which that court held that the forfeiture of drug proceeds under 18 U.S.C. 981(a)(1)(A) and 21 U.S.C. 881(a)(6) constitutes a punishment for double jeopardy purposes. *United States* v. *$405,089.23 U.S. Currency*, No. 93-55947 (9th Cir. Sept. 6, 1994). The Ninth Circuit in that case expressly disagreed with the Fifth Circuit's decision in the instant case, and with the Second and Eleventh Circuits' decisions holding that parallel civil and criminal actions of the type at issue here must be considered the same proceeding for purposes of the Double Jeopardy Clause. The Ninth Circuit relied on *Austin* to hold that, without regard to the specific characteristics of the property involved, forfeiture under the statutes at issue here always constitutes punishment. Following its decision in *$405,089.23 U.S. Currency*, the Ninth Circuit examined whether a civil forfeiture under 21 U.S.C. 881(a)(4)

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[8] As the Second Circuit recognized in *Millan* (2 F.3d at 20), the prohibition against imposing multiple punishments in successive proceedings is based on the concern that the government "is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." *United States* v. *Halper*, 490 U.S. at 451 n.10. That concern is not present where, as here, the criminal prosecution is initiated before any adjudication of the parties' rights in the civil forfeiture action. To the contrary, permitting a claim of double jeopardy where, as here, the defendant has voluntarily settled or otherwise terminated a forfeiture action with full knowledge of the pendency of related criminal charges, and when he has failed successfully to bargain for dismissal of those charges, raises many of the same concerns that have led this Court to prohibit the use of double jeopardy claims "as a sword." *Ohio* v. *Johnson*, 467 U.S. 493, 502 (1984) (citing *Jeffers* v. *United States*, 432 U.S. 137 (1977)).

and (7) should be considered the "same offense" as factually related criminal offenses, and it answered that question in the affirmative, reasoning that "[b]ecause those sections incorporate the elements of criminal offenses, forfeitures pursuant to them constitute a species of greater offenses with respect to the lesser-included offenses that form the bases of the forfeitures." *United States* v. *One 1978 Piper Cherokee Aircraft*, No. 92-15350 (9th Cir. Sept. 30, 1994), slip op. 11849, 11862.[9]

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[9] Petitioners also allege (94-231 Pet. 11; 94-243 Pet. 18-19) a conflict with an earlier Fifth Circuit decision, *Wood* v. *United States*, 863 F.2d 417, 421 (1989), in which a panel of that court stated that "[f]orfeiture cannot seriously be considered anything other than an economic penalty for drug trafficking." The issue in that case, however, was whether a taxpayer was entitled to a loss deduction for money forfeited as proceeds of drug smuggling, and the court made the quoted statement in discussing whether there was a public policy rationale for denying the deduction. Whether a forfeiture is a "punishment" for double jeopardy purposes is a distinct question that was not before the court in *Wood*. In any event, any conflict between decisions of the same court is a matter for resolution by the court of appeals itself, not this Court. *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

Petitioners also cite (94-231 Pet. 15-16; 94-243 Pet. 20-22) two state cases, *Fant* v. *State*, 881 S.W.2d 830 (Tex. Ct. App. 1994), review granted, No. 1047-94 (Tex. Oct. 12, 1994), and *State* v. *1979 Cadillac Deville*, 632 So. 2d 1221 (La. Ct. App. 1994), writ granted, No. 94-C-1077 (La. Sept. 23, 1994), which they contend conflict with the decision below. Only *Fant* v. *State*, however, reached a broad holding that forfeiture under a statute similar to the federal law at issue here always constitutes a punishment for double jeopardy purposes; *State* v. *1979 Cadillac Deville* held only that the forfeiture of the claimant's automobile was not remedial because the property was only an instrumentality and not contraband. In any case, neither of those decisions is from the highest court of the State and in each of them further review has been granted by the

We believe that the Ninth Circuit's reading of *Austin* is incorrect, and that its conclusions concerning the definition of "multiple proceedings" and the elements of the forfeiture "offense" are erroneous. The Ninth Circuit also departed from *Halper*'s directive to make a "particularized assessment" of "the sanction as applied in the individual case." 490 U.S. at 447-448. The court's interpretation of the rule of *Halper*, which was explicitly reserved for "the rare case" (*id.* at 449), expansively applies it to virtually every case in which the government seeks a civil forfeiture of a drug defendant's proceeds. See Pet. App. 19a; see also *United States* v. *One 1978 Piper Cherokee Aircraft*, No. 92-15350, slip op. 11863 (Rymer, J., concurring) (disagreeing with *$405,089.23 U.S. Currency*, but concurring "only because I am constrained to follow" it as circuit precedent).

The conflict between the Ninth Circuit's decisions and those of other courts may warrant this Court's attention, but the issue is not presently ripe for review by this Court. The government has filed a petition for rehearing and a suggestion for rehearing en banc in *$405,089.23 U.S. Currency*. It is possible that the conflict will be resolved through the en banc process, thus obviating the need for this Court's review.[10] Moreover, because petitioners have not been tried on the pending indictments, they will have an opportunity to seek this Court's review of their "multiple punishments" claim in the event review is now denied and they are ultimately convicted.

State's highest court. Those decisions therefore do not represent a final resolution of the issues binding on all the courts of the State.

[10] As shown by *One 1978 Piper Cherokee Aircraft*, the correctness of *$405,089.23 U.S. Currency* has already been called into question by one of the judges in that circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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